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## TRANSMITTAL FORM

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Total Number of Pages in This Submission 70

Application Number	09/747,529
Filing Date	December 22, 2000
First Named Inventor	Sheppard, James M. Jr.
Art Unit	1771
Examiner Name	Befumo, Jenna-Leigh
Attorney Docket Number	2827

### ENCLOSURES (Check all that apply)

<input checked="" type="checkbox"/> Fee Transmittal Form	<input type="checkbox"/> Drawing(s)	<input type="checkbox"/> After Allowance Communication to TC
<input checked="" type="checkbox"/> Fee Attached	<input type="checkbox"/> Licensing-related Papers	<input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences
<input type="checkbox"/> Amendment/Reply	<input type="checkbox"/> Petition	<input checked="" type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) (3 copies)
<input type="checkbox"/> After Final	<input type="checkbox"/> Petition to Convert to a Provisional Application	<input type="checkbox"/> Proprietary Information
<input type="checkbox"/> Affidavits/declaration(s)	<input type="checkbox"/> Power of Attorney, Revocation	<input type="checkbox"/> Status Letter
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<input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<b>Remarks</b> certificate of express mailing return receipt postcard	

### SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	Dougherty, Clements, Hofer & Bernard		
Signature			
Printed name	Gregory N. Clements		
Date	December 23, 2004	Reg. No.	30,713

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# FEE TRANSMITTAL For FY 2005

☒ Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT (\$ ) 250.00

## Complete if Known

Application Number	09/747,529
Filing Date	12/22/2000
First Named Inventor	Sheppard, James M. Jr.
Examiner Name	Befumo, Jenna-Leigh
Art Unit	1771
Attorney Docket No.	2827

## METHOD OF PAYMENT (check all that apply)

☐ Check ☒ Credit Card ☐ Money Order

☐ Deposit Account ☐ None

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04-1448

Deposit Account Name  
Dougherty, Clements, Hofer

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## FEE CALCULATION

### 1. BASIC FILING FEE

Fee Description	Fee (\$)	Small Entity Fee (\$)	Fee Paid (\$)
Utility Filing Fee	790	395	
Design Filing Fee	350	175	
Plant Filing Fee	550	275	
Reissue Filing Fee	790	395	
Provisional Filing Fee	160	80	

Subtotal (1) \$

## FEE CALCULATION (continued)

### 2. EXTRA CLAIM FEES

Fee Description	Fee (\$)	Small Entity Fee (\$)
Each claim over 20	18	9
Each independent claim over 3	88	44
Multiple dependent claims	300	150
For Reissues, each claim over 20 and more than in the original patent	18	9
For Reissues, each independent claim more than in the original patent	88	44

Total Claims Extra Claims Fee (\$) Fee Paid (\$)

- 20 or HP = x =  
HP = highest number of total claims paid for, if greater than 20

Indep. Claims Extra Claims Fee (\$) Fee Paid (\$)

- 3 or HP = x =  
HP = highest number of independent claims paid for, if greater than 3

Multiple Dependent Claims Fee (\$) Fee Paid (\$)

Subtotal (2) \$

### 3. OTHER FEES

Fee Description	Fee (\$)	Small Entity Fee (\$)	Fee Paid (\$)
1-month extension of time	110	55	
2-month extension of time	430	215	
3-month extension of time	980	490	
4-month extension of time	1,530	765	
5-month extension of time	2,080	1,040	
Information disclosure stmt. fee	180	180	
37 CFR 1.17(q) processing fee	50	50	
Non-English specification	130	130	
Notice of Appeal	340	170	
Filing a brief in support of appeal	340	170	250.00
Request for oral hearing	300	150	
Other:			

Subtotal (3) \$ 250.00

## SUBMITTED BY

Signature	<i>Gregory M. Clements</i>	Registration No. Attorney/Agent 30,713	Telephone 704-366-6642
Name (Print/Type)	Gregory M. Clements	Date December 23, 2004	

This collection of information is required by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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Docket: 2827

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IN THE UNITED STATES  
PATENT AND TRADEMARK OFFICE BEFORE THE  
BOARD OF  
PATENT APPEALS AND INTERFERENCES

In re Application of:

Sheppard

Serial No.: 09/747,529

Filed: December 22, 2000

For: JACQUARD WOVEN  
TEXTILE WITH GRAPHIC  
IMPRESSION AND A  
METHOD OF MAKING THE  
SAME

Group Art Unit: 1771

Examiner: Befumo, Jenna-Leigh

Appeal No.:

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

BRIEF OF APPELLANTS

This is an appeal from the non-final rejection of the Examiner dated October 4, 2004, rejecting Claims 21-36, all claims currently pending in the case. The Applicant files this Appeal under 37 C.F.R. § 1.191(a), having had all claims twice rejected. The requisite fee set forth in 37 C.F.R. §1.17(c) accompanies this Brief.

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*REAL PARTY IN INTEREST (37 C.F.R. §1.192(c)(1))*

Inventor James M. Sheppard has assigned all his rights and interests in the current invention to Devant Ltd., a North Carolina Corporation. As such, Devant Ltd. is the real party in interest in this case. Mr. Sheppard is the President of Devant Ltd.

*RELATED APPEALS AND INTERFERENCES (37 C.F.R. §1.192(c)(2))*

An appeal has also been filed for related Application Serial No. 09/837,094, entitled JACQUARD OR DOBBY WOVEN TEXTILE WITH GRAPHIC IMPRESSION AND A METHOD OF MAKING THE SAME, filed on April 18, 2001. A Notice of Appeal was filed on November 11, 2004. Applicant's Appeal brief was filed on the same date as this Brief.

*STATUS OF CLAIMS (37 C.F.R. §1.192(c)(3))*

The application was filed on December 22, 2000, claiming priority under 37 C.F.R. § 1.78(a)(4) of U.S. Provisional Application No. 60/173,275 filed on December 28, 1999. The application was originally filed with 20 claims of which two (2) were independent claims (Claims 1, and 16).

All of the claims were rejected in the Examiner's first Office Action of October 4, 2002.

An Examiner interview was conducted on November 6, 2002, where the Examiner suggested changing the claims to product-by-process claims to more clearly define the structure of the finished product.

In Applicant's response dated November 18, 2002, all of the original claims 1-20 were cancelled, and new claims 21-36 were added in light of the Examiner's comments during the interview. Claims 21 and 29 were the only two independent claims that were added.

In the subsequent Office Action of January 23, 2003, which was made final, the Examiner rejected all claims 21-36.

On April 23, 2003, the Applicant filed a Notice of Appeal to the Board of Patent Appeals and Interferences, followed by an Appeal brief. In a decision dated July 29, 2004, the Board reversed the Examiner's rejection and affirmed the Applicant's position regarding the Examiner's rejection.

The Examiner then reopened prosecution, issuing the current Office Action on October 4, 2004, rejecting all claims 21-36.

The status of the claims is as set out in Examiner's Non-Final Rejection dated October 4, 2004, and is as follows:

Allowed claims—none

Claims objected to—none

Claims rejected—21-36.

#### *STATUS OF AMENDMENTS (37 C.F.R. §1.192(c)(4))*

The Examiner issued a non-final Office Action on October 4, 2004. However, having had the claims more than twice rejected, Applicant has chosen to directly appeal the Office Action under 37 C.F.R. §1.191(a).

*SUMMARY OF INVENTION (37 C.F.R. §1.192(c)(5))*

In the weaving of terry toweling, three series of yarns are employed: (a) pile warp which produces the loops for the pile surface (b) ground warp from which the pile warp projects and (c) weft which binds the two warps together.

Jacquard weaving is a well-known process that can be employed for creating thick, luxurious pile textile items capable of having a velour or looped terry nap. This weaving process employs two different colors in the linear band of the warp filaments when fabricating the textile. See Specification, page 2 paragraph 3. Colors and patterns in a jacquard article are restricted to the two colors employed in a given linear direction of the woven article. Any pattern of color 1 that is woven into one side of the article with a background of color 2 is repeated on the reverse side of the article but with a reversed color scheme, i.e., a pattern of color 2 and a background of color 1. This limits the utility for these types of articles, since many designs and logos cannot be adequately reproduced within the confines of the jacquard two-color scheme.

Printing processes on jacquard fabrics have been limited to preprinting the warp filaments with an elongated vertical pattern such that when woven, a jacquard article with more than 2 colors can be achieved. This process requires elaborate computer controlled printing onto the filaments, and very precise monitoring of the weaving process. Printing a pattern post-weave on an article has been employed in non-jacquard situations, but this results in an article that is largely limited to a single color on the nonprinted side of the article. Printing on the reverse side of the non-jacquard article is largely prohibited due to the likelihood that the separately printed images on opposite sides of the article will bleed through the article and disfigure the images on both printed sides. Post printing also has the undesirable side effect of decreasing the absorbency of the towel.

Applicant has recognized the deficiencies of both the jacquard weaving process, namely the limitation of a two-color scheme in a linear band, and the traditional printing process (wherein the finished article is limited to a single color in the unprinted area) and

has created the novel "Edge® Towel." This article employs jacquard weaving to create an article with a central light colored area, surrounded by a dark border. Due to the jacquard process, the reverse side of the article is a dark colored central area surrounded by a light colored border. A design can be positioned in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, The dark central area on the reverse side of the article is capable of masking any potential bleed through of the design on the light colored central area of side one. This allows the applicant to apply the image so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color.

Additionally, affixing a design on a jacquard article gave the unexpected result of producing an image that was more crisp and sharp than other towels. The inventor attributes this surprising result to the increased density of the pile loops on a jacquard article as compared to other woven articles. Thus, viewing an image on a jacquard fabric is not unlike watching high definition television: the picture is more clear and sharp than the picture available on the alternative.

*ISSUES (37 C.F.R. §1.192(c)(6))*

The Examiner has rejected claims 21-36 under 35 U.S.C. §103(a) as being unpatentable over Hobson (4,259,994) in view of Carpenter et al. (5,983,952) and Sherrill et al. (3,721,273). This is the only rejection of the claims. Therefore, the issues to be decided in this appeal are the following:

1. It is the Examiner's position that the Hobson patent discloses a woven towel made from different color yarns that can be printed with a design pattern prior to weaving, and that the figures show different colored regions around the edges. The



Examiner states that Carpenter et al. provides evidence that towels can be produced on different types of looms to produce decorative designs in the woven fabric by changing the weave pattern of the yarns, and that the woven structure can be combined with printed designs. Sherrill et al. is cited for disclosing the claimed woven design. From this, the Examiner concludes that it would have been obvious to one of ordinary skill in the art to create towels with a known design structure, as shown in Sherrill et al., by combining woven patterns with printed patterns as taught in Carpenter et al. in the fabric of Hobson to create towels with more intricate designs at a lower cost due to the use of print to create complex designs in the fabric.

2. The Examiner's position is that Applicant's declaration under 37 C.F.R. 1.132 is insufficient to overcome the rejection of claims 21-36 based upon Hobson and Carpenter et al. because the affidavit fails to provide hard evidence which established the claimed product fills a long felt need or resulted in commercial success.

*GROUPING OF CLAIMS (37 C.F.R. §1.192(c)(7))*

As to the rejection applied against claims 21-36 (35 U.S.C. §103(a)), it is the applicant's intention that the rejected claims do not stand or fall together. The applicant considers some claims to have additional patentably distinct features that should be judged on their own merits.

*ARGUMENT (37 C.F.R. §1.192(c)(8))*

Issue 1—The rejection of Claims 21-26 under 35 U.S.C. §103(a) as being unpatentable over Hobson (U.S. Pat. No. 4,259,994) in view of Carpenter et al. (U.S. Pat. No. 5,983,952) and Sherrill et al. (U.S. Pat. No. 3,721,273).

Hobson discloses printing on unwoven side-by-side yarns certain desired patterns in order to make two towels. The two towels are side-by-side on the loom. The looms produce a first towel with a floral pattern, and a second towel of the second color having the same floral pattern.<sup>1</sup> The color schemes can remain the same on the reverse side of each towel<sup>2</sup>, or the reverse side can be ecru or bleached.<sup>3</sup> Hobson does not teach using a Jacquard loom.

Carpenter et al. discloses applying a printed pattern to jacquard woven fabric. An elongated pattern is printed onto unwoven side-by-side yarns. Those yarns are then wound on a beam and then the beam is taken to a loom where the textile is woven. Precise control over the tension of the yarns is required to accurately reproduce the image preprinted on the yarns when the yarns are woven into the finished textile article.

Sherrill et al. discloses a terry towel having one face cotton terry, and the opposite face rayon terry. As can be seen in the Figures of Sherrill, the first side (Fig. 1) has printed thereon a central design, and an outer region having additional printed designs thereon. The second side (Fig. 2) is entirely of cotton terry without any designs.

The Examiner sets forth many of the features of Hobson, Carpenter et al., and Sherrill et al., and concludes that “it would have been obvious to one of ordinary skill in the art to create towels with a design structure, as shown in Sherrill et al., by combining woven patterns with printed patterns as taught in Carpenter et al., in the fabric of Hobson, which teaches creating towels with differed colored sections combined with printed patterns to create towels with more intricate designs at a lower cost due to the use of print to create a towel that is visually and texturally appealing due to the printed images, colors, and weave structure.” This rejection is respectfully traversed for the following reasons.

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<sup>1</sup> U.S. Pat. No. 4,259,994 at col. 3, lines 33-35.

<sup>2</sup> Id. at col. 2, lines 23-25.

<sup>3</sup> Id. at col. 2, lines 48-50.

Claims 21 and 29 are the independent claims. Attached Table 1 sets forth the elements of both claims 21 and 29 and views these with respect to the rejection of Hobson vs. Carpenter et al. vs. Sherrill et al. Claim 21 starts by calling for weaving a towel on a jacquard loom using at least 2 different colors. Hobson teaches away from using jacquard looms in column 2, line 18. Carpenter et al., on the other hand, have a jacquard loom as item 26. Sherrill et al. are silent as to the loom. It is unclear how the Examiner intends to combine these references since Hobson teaches away from using a jacquard loom; Carpenter teaches using a jacquard loom, and Sherrill is silent as to this feature. These teachings are like oil and water and are not meant to be mixed.

Claim 21 calls for a border having a first color that is woven adjacent each edge on one side of the towel. Neither Hobson, Carpenter, nor Sherrill has this feature. The Examiner notes that Hobson has a product which can have blue floral “borders” on one side and gold floral “borders” on the adjacent towel. However, these are not borders. These are merely stripes. A border is something that goes continuously around the entire edge of the product, as clearly set forth in Claim 21. Claim 21 states that the border is adjacent “each edge”. It is clear that the floral stripes of Hobson are only adjacent 2 edges, but are not adjacent the third and fourth edge of a two-dimensional product. Furthermore, there is no way one skilled in the art can modify Hobson or Carpenter and place a “border” on all edges without totally ignoring the teachings of these references. Sherrill et al. appears at first glance to have such a border, however, such is not the case. The Sherrill towel is woven such that the first side is entirely rayon terry, while the second side is entirely cotton terry. Therefore, the border of Sherrill as shown in Figure 1 is defined by a printed pattern (reference number 25). A printed border belies the Applicant’s invention, which requires a woven border for proper masking of misaligned and intense graphic printing.<sup>4</sup>

Claim 21 continues by stating that a border having a second color is adjacent each edge of the towel on its other side. Again, neither Hobson nor Carpenter has this for the same reason set forth above, i.e., Hobson/Carpenter teaches stripes but not borders

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<sup>4</sup> See Application as filed, Page 8, paragraph 2, and page 9, final paragraph.

adjacent “each edge” of the towel. Sherrill et al. teach that the reverse side, as seen in Figure 2, is entirely of plain cotton terry. The Sherrill et al. towel is specifically manufactured so that the rayon terry piles are entirely on one side of the towel and the cotton terry piles are entirely on the other side.<sup>5</sup> Sherrill et al. teach printing on the rayon fibers only, since they have an increased absorption for certain dyes, as is well known in the art. The printed pattern would therefore appear only on one side, the rayon side, of the towel. The reverse side of the towel, the cotton side, would not have the alternate color pattern as claimed and required by the Applicant.

Claim 21 continues by stating that the towel has a central area within the borders on both sides of the towel. While there is central area in any two-dimensional product, this central area claimed in Claim 21 must be within the borders. The lack of borders by both Hobson/Carpenter makes the location of the central area on the towel unclear to those skilled in the art. The Sherrill et al. towel has a central area on only one side of the towel.

Claim 21 continues by stating that the central area on one side is in a first color, while the central area on the other side is in a second color. Neither Hobson, Carpenter et al., nor Sherrill et al. teach that the color on a towel is such that the central area on a first side and the borders on the second side are of one color, while the central area of the second side and the borders of the first side are of a second color. This is how Devant sets up the Jacquard loom to make the Edge towel.

Lastly, Claim 21 calls for forming a graphic impression in the central area on one of the sides. Neither Hobson nor Carpenter forms a graphic impression in the central area of a woven product - Figure 1 of Sherrill et al. discloses this.

By utilizing the color scheme in claim 21, other objects of the invention can be achieved. This article employs jacquard weaving to create an article with a central light colored area, surrounded by a dark border. Due to the jacquard process, the reverse side

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<sup>5</sup> U.S. Pat. No. 3,721,273, col. 2, lines 52-59.

of the article is a dark colored central area surrounded by a light colored border. A design can be printed in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process of Hobson and Carpenter. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the design on the light colored central area of side one. This allows the applicant to apply the image so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color. This scheme is present in claim 21, and is also further defined in claim 23, by calling for the general color scheme.

Claim 23 is separately patentable due to the further defined color scheme's increased effectiveness at masking bleed through and misalignment of applied images. None of the applied references disclose the claimed color scheme.

In considering Claim 29, it calls for a textile having edges adjacent its periphery. Each of Hobson, Carpenter, and Sherrill has this feature.

Claim 29 continues by calling for a textile having first and second sides and, again, each of Hobson, Carpenter, and Sherrill has this feature.

Claim 29 calls for each side having a border adjacent said edges and surrounding a central area. Neither Hobson nor Carpenter has borders surrounding each edge of the towel and correspondingly, neither surround a central area. Sherrill et al. have an outer region having additional printed designs on only one side.

Claim 29 calls for the graphic impression to be positioned only within the central area on one side. Sherrill et al. discloses this in Figure 1.

The last two limitations of Claim 29 are with respect to the color of the border and the central area. Specifically, the border on the first side and the central area on the second side have a first color, while the central area on the first side and the border on the second side have a second color. Neither Hobson, Carpenter et al., nor Sherrill et al. teach these limitations.

By utilizing the color scheme in claim 29, other objects of the invention can be achieved. This article employs jacquard weaving to create an article with a central light colored area, surrounded by a dark border. Due to the jacquard process, the reverse side of the article is a dark colored central area surrounded by a light colored border. A design can be printed in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the printed design on the light colored central area of side one. This allows the applicant to apply the printed image so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color. This scheme is present in claim 29, and is also further defined in claim 31.

At the middle of page 5, the Examiner states what is well known in patent law that matters relating to ornamentation only which have no mechanical function, cannot be relied upon to patentably distinguish the claimed invention from the prior art. However, the Examiner concludes that the only features of the present invention that deserve patentable weight include, the woven towel having different color yarns which create a first pattern on the first side and an inverse pattern on the reverse side, and a graphic impression, and states that each of these features are found solely within the Hobson reference. This bald conclusion only demonstrates that the Examiner has never understood, and still does not understand the technology of the present invention. As has been repeatedly stated, the dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the

central area.<sup>6</sup> This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the printed design on the light colored central area of side one.<sup>7</sup>

The Applicant finds it remarkable that the Examiner is now arguing that Hobson alone teaches every limitation in the claims that should receive weight in determining patentability. The Board has already stated that Hobson in view of Carpenter does not establish obviousness. The Applicant is therefore amiss as to how Hobson alone would do so.

Attached Table 1 sets forth the elements of both claims 21 and 29 and views these with respect to the rejection of Hobson, Carpenter, and Sherrill.

Issue 2—The Applicant's Rule 132 Declaration dated March 31, 2003, was submitted for establishing the commercial success of the "Edge® Towel" as indicia of nonobviousness.

In the Board's decision of July 29, 2004, a decision was rendered solely on the basis that the Examiner's rejection did not establish prima facie obviousness. The Board, therefore, did not comment on the applicability of the Applicant's submitted Declaration. The Declaration is resubmitted for consideration.

The data and statements set forth in the Declaration supplied the Examiner with confidential and commercially sacred information concerning the sales of the Edge towel. From that it can be seen that in less than 3 years time, the Edge towel came to account for over 25% of Applicant's total revenue and over 20% of total pieces sold, while never accounting for more than 1% of Applicant's total products. Additionally in the Declaration, Applicant submitted two letters that were written to industry competitors

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<sup>6</sup> See Application as filed, page 9, final paragraph.

<sup>7</sup> See Application as filed, Page 8, paragraph 2.

persuading them in light of this application to cease production of towels that were copied from Edge articles.

On page 2, paragraph 3 of the Final Rejection, the Examiner states that the Affidavit under 37 C.F.R. 1.132 is insufficient to overcome the rejection because the Affidavit fails to provide hard evidence which established the claimed product fills a long felt need or resulted in commercial success. The Examiner makes a number of statements in responding to the Amendment that bridge pages 2 and 3 of the Office Action. These statements will be addressed one at a time, as set forth hereinafter.

The Examiner's first statement is, "while the Applicant sets forth multiple statements related to the product's success and the Applicant's opinion why the product fills a long felt need, the Applicant fails to include any factual evidence which supports these statements."

First, why should actual evidence be needed? The Inventor has provided the original affidavit, which was notarized, and clearly stated therein that the Edge towel has enjoyed commercial success. If the Inventor lied, thus committing Fraud on the Patent Office, the entire patent would be unenforceable. With this penalty in mind, the Inventor only made truthful statements. Is providing the Patent Office with factual data more probative evidence than the Inventor's own statements? Not according to *In re Tiffin and Erdman* cited in the remarks of Applicant's Response of November 20, 2002. With over 200 years of legal history in the U. S., it is clear that courts highly favor actual testimony, such as Affidavits, over raw factual data. Nevertheless, in spite of the above explanation, a Supplemental Affidavit supplying confidential sales and financial figures related to the Edge towel, as well as letters and various correspondence from competitors who clearly would like to, or have tried to knock off the present invention was submitted to the Examiner, and is now part of the record.

In the next paragraph on page 2 of the Office Action, the Examiner states that Applicant needs to produce evidence such as market share or other factual evidence that



would show how the towel has succeeded versus all competitors. The Examiner states that there is no evidence to show how successful the product has been in the market as compared to all competitors in the field. First, the U.S. towel industry is small. There is no trade association that can legally provide sales figures in the relevant industry. The textile market itself does have a trade association, but it has no subgroup for towels. If Devant solicited sales data from its competitors, this would be an antitrust violation. And because no one wants to be involved in an antitrust violation, no one will provide such figures.

Second, the Examiner should know that the textile market did poorly in 2001 and 2002, as compared to 2000 (for sometime, the U.S. textile market has been relocating south of the border and to Asia due to cheaper production costs). Devant was no exception as its sales dropped 11.5%. On the other hand, the number of Edge products produced and sold increased greater than 5 times during this same period, and the same is true for its dollar sales figure. Assuming that all other competitors had down years, as Devant did, data submitted herewith clearly shows that sales of the Edge towel was growing.

The Examiner further states that Applicant bears the burden of proof of establishing a nexus between the claimed invention and evidence of commercial success and that the success is due to the claimed invention. Other than the broad general statement, the Examiner has offered no specific and detailed comments that the Applicant has not already established the nexus between the claimed invention and the evidence of commercial success. The bear proof of this lies in the fact that the claims are narrow and specific to the Edge towel. The Edge towel covers each of the types of Edge towels set forth in the Supplemental Affidavit of success. The original Affidavit of success set forth the fact that it was created due to the inability and limitations of the jacquard process. Specifically, the original Affidavit says that by weaving a jacquard woven perimeter and having a graphic impression added to the towel overcomes the prior obstacles of being able to use a limited number of colors in a linear band in a woven graphic impression. This and other limitations in the claims are the nexus.

Lack of any specific deficiencies listed by the Examiner is indicative of the fact that the Examiner must believe that the claimed invention and the evidence of commercial success are satisfactorily entwined.

In the sentence bridging pages 2 and 3 of the Office Action, the Examiner states that *Applicant's statement that the claimed subject matter solved the problem that was long standing in the art, while on the other hand lacking a showing that others of ordinary skill in the art were working on the problem and if so, for how long* is perhaps best answered by the Supplemental Affidavit previously submitted to the Examiner. While the Supplemental Affidavit does not state that others were working on this problem or that they even recognize the problem, the fact that the Edge towel has had so much commercial success, and in particular the fact that its sales have increased more than 5 fold in the years 2000 – 2002 indicate that the marketplace recognize the superior product and that there was a long felt need for this. The lack of evidence relative to what others of ordinary skill in the art were doing is only one of many factors the Examiner should consider in evaluating commercial success. If many other factors are present, and this one factor is not present, this does not demonstrate that there is a lack of commercial success. Nowhere in the MPEP, nor in any case law is there an explanation as to what factors are minimally required for proving commercial success. Instead, the courts recognize, and the MPEP supports such, by suggesting that there are many factors which one can consider when evaluating commercial success.

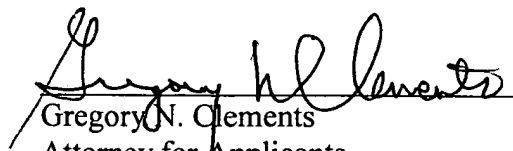
The first full sentence atop page 3 of the Office Action, the Examiner says that there is no evidence that those skilled in the art knew of the teachings of the above-cited references and that they were still unable to solve the problem. On the other hand, there is no reason to suggest that they did not know of the prior art. And yet, the present Inventor created the Edge towel. As set forth below relative to the rejections, it is submitted that even if those skilled in the art knew of the teachings of the cited reference they would still not arrive at the claimed invention because the cited references do not

disclose all the elements of the claimed invention. "Knowing the cited references" would not help those skilled in the art relative to the present invention.

On page 3, the Examiner states that evidence of infringement can be used to establish the long felt need was present in the marketplace. The Examiner states that Applicant has submitted no evidence detailing competitors trying to copy the invention. With the introduction of the Supplemental Affidavit, evidence is submitted to provide these details. As set forth in the Supplemental Affidavit, two of Devant's biggest competitors have copied the Edge towel, but were persuaded to stop because of this patent application. The first event was noted at the PGA (Professional Golf Association) show in early 2001 where Tommy Hilfiger voluntarily pulled its product on the first day of the show, after speaking with the Inventor about the Edge towel. The second event was the result of a conversation discussing Admanco's towel, and their voluntary agreement not to sell their knock-off towel.

Accordingly it is submitted that the Rule 132 Declarations provide convincing evidence of the unobviousness of the invention.

Respectfully submitted,



Gregory N. Clements  
Attorney for Applicants  
Registration No. 30,713

DOUGHERTY, CLEMENTS, HOFER & BERNARD  
1901 Roxborough Road, Suite 300  
Charlotte, North Carolina 28211  
Telephone: (704) 366-6642  
Facsimile: (704) 366-9744

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**TABLE 1**

Claim 21	Hobson v. Carpenter v. Sherrill
Weaving a towel on a Jacquard loom using at least 2 different colors.	<div>Hobson teaches away from Jacquard loom, col. 2, line 18</div> <div>Carpenter has Jacquard loom item 26</div> <div>Sherrill does not disclose weaving loom.</div>
Such that a border having a 1 <sup>st</sup> color is woven adj. each edge on one side thereof.	Neither Hobson nor Carpenter has this. Sherrill has a border defined by printing.
And a border having a second color is woven adj. each edge of said towel on the other side.	Neither Hobson nor Carpenter nor Sherrill has this.
Said towel having a central area woven within the borders on both sides.	There is a central area but no borders. Sherrill has a central area on only one side.
Said central area on other side is woven with 1 <sup>st</sup> color.	There is a central area but no borders.
Said central on said one side is woven in a 2 <sup>nd</sup> color.	There is a central area but no borders. Sherrill's border is same color as central area.
Forming a graphic impression in said central area on said one side.	Neither Hobson nor Carpenter has this. Sherrill discloses this.
Claims 22 – 28 not disclosed by Hobson & Carpenter.	Claim 28 – Hobson mentions shearing (Col. 2, line 33) not blooming. Sherrill discloses this.

**TABLE 1** (*continued*)

Claim 29	Hobson v. Carpenter v. Sherrill
A textile having edges adjacent its periphery.	Both have this.
Said textile having 1 <sup>st</sup> and 2 <sup>nd</sup> side.	Both have this.
Each side having a border adj. said edges and surrounding a central area.	Hobson and Carpenter do not have this. Hobson has side edges not borders. Sherrill has this.
Graphic impression being positioned only within central area on 1 <sup>st</sup> side.	None have this.
Said border on 1 <sup>st</sup> side & central area on 2 <sup>nd</sup> side having a 1 <sup>st</sup> color.	None has this.
Said centered areas on said 1 <sup>st</sup> side & said border on said 2 <sup>nd</sup> side having a 2 <sup>nd</sup> color.	None has this.

*APPENDIX (37 C.F.R. §1.192(c)(9))*

The claims on appeal appear as follows:

21. A towel (Fig 1, ref# 10) having a graphic impression (Fig 1, ref# 20 & 22), comprising: weaving a towel on a jacquard loom using at least two different colors of yarn, such that a border (Fig 1, ref# 16) having a first color is woven adjacent each edge of said towel, on one side thereof, and a border having a second color (Fig 1, ref# 18) is woven adjacent each edge of said towel on the other side, said towel having a central area woven within said borders on both said one side and said other side, said central area (Fig 1, ref# 26) is woven with said first color on said other side, said central area (Fig 1, ref# 18) is woven with said second color on said one side, and forming a graphic impression in said central area on said one side.
22. The product of claim 21, wherein said forming is by screen printing, image dyeing, digital imaging, or heat transferring.
23. The product of claim 21, wherein said border on said one side and said central area on said other side having said woven first color is a dark color, whereas said border on said other side and said central area on said one side is a light color.
24. The product of claim 23, wherein said graphic impression has at least two different colors, neither being said first nor said second color.

25. The product of claim 23, wherein said border shape is selected from the class of rectangular shape, circular shape, oval shape, square shape, and irregular shape.
26. The product of claim 25, wherein said border is solid or a pattern.
27. The product of claim 26, wherein said pattern is selected from the class consisting of stripes, dots, names, silhouettes of sport players, animal shapes, corporate logos, or university mascots.
28. The product of claim 21, wherein said towel is sheared and bloomed.
29. A textile having a graphic impression; said textile having edges about its periphery; said textile having first and second sides; each side having a border adjacent said edges and surrounding a central area; said graphic impression being only positioned within said central area on said first side; said border on said first side and said central area on said second side having a first color; and said central area on said first side and said border on said second side having a second color.
30. The textile of claim 29, wherein said textile is a towel.
31. The textile of claim 30, wherein said first color is a dark color border and said second color is a light color.



32. The textile of claim 30, wherein said border shape is selected from the class of rectangular shape, circular shape, oval shape, square shape, and irregular shape.
33. The textile of claim 30, wherein said border is solid or a pattern.
34. The textile of claim 33, wherein said pattern is selected from the class consisting of stripes, dots, names, silhouettes of sport players, animal shapes, corporate logos, or university mascots.
35. The textile of claim 29, wherein said textile is sheared and bloomed.
36. The textile of claim 30, wherein said towels are selected from the class of a bath towel, beach towel, kitchen towel, or a sport towel.